

Supreme Court, U. S.
FILED

JAN 12 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76 - 959

JOHN NEWMAN,

Respondent,

versus

C. MURRAY HENDERSON, WARDEN,

Petitioner.

On Application For A Writ Of Certiorari
Directed To The United States
Fifth Circuit Court Of Appeals

PETITION OF STATE OF LOUISIANA ON BEHALF OF
C. MURRAY HENDERSON, WARDEN

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF
LOUISIANA

HARRY F. CONNICK,
DISTRICT ATTORNEY FOR THE
PARISH OF ORLEANS

LOUISE KORNS,
ASSISTANT DISTRICT
ATTORNEY FOR THE
PARISH OF ORLEANS

Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

TABLE OF CONTENTS

Report of Proceedings Below	1
Jurisdictional Grounds	1
Questions for Review	2
Statement of the Case	3
Argument	6
Reasons for Granting the Writ	14
Conclusion	15
Certificate of Service	16
Appendix	
Opinion of the United States Court of Appeals, Fifth Circuit	1a
Judgment	7a
Order Denying Petition for Rehearing	8a
Order Staying Issuance of Mandate	10a

TABLE OF AUTHORITIES

Cases:	
Barker v. Wingo, 407 U.S. 514 (1972)	4
Davis v. United States, 411 U.S. 233 (1973)	5,8
Eubanks v. Louisiana, 356 U.S. 584 (1958)	3,10,14
Francis v. Henderson, ____ U.S. ____, 48 L.Ed.2d 149 (1976)	5
Lefkowitz v. Newsome, 420 U.S. 283 (1975) ..	5,7,8,14
Michel v. Louisiana, 350 U.S. 91 (1955)	13
Newman v. Henderson, 496 F.2d 896 (5th Cir. 1974)	5,8

TABLE OF AUTHORITIES (Continued)

	Page
Newman v. Henderson, — U.S. —, 48 L.Ed.2d 791 (1976)	5,6,8
State v. Barksdale, 247 La. 198, 170 So.2d 374 (1964), cert. den. Barksdale v. Louisiana, 382 U.S. 921 (1965)	2,3,4,5,6,7,9,10,12,13,14
State v. Brown, 249 La. 235, 186 So.2d 576 (1966)	2
State v. Evans & Butler, 249 La. 861, 192 So.2d 103 (1965), cert. den. 389 U.S., 887 (1967)	2
State v. Johnson, 249 La. 950, 192 So.2d 135 (1966)	2
State v. Revere, 232 La. 184, 94 So.2d 25 (1967)	9
State v. Gary Simpson, 247 La. 883, 175 So. 2d 255 (1965), cert. den. 384 U.S. 1014 (1966)	2,3,6,7,12,13
Washington v. Davis, — U.S. —, 48 L.Ed.2d 597 (1976)	2,6,9,10,11,15
Statutes:	
Arts. 412-413, La. Code Crim. Proc. 1967	9-10
La. R.S. 15:196, 15:197	9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

JOHN NEWMAN,

Respondent,

versus

C. MURRAY HENDERSON, WARDEN,

Petitioner.

On Application For A Writ Of Certiorari Directed To
The United States Fifth Circuit Court of Appeals

PETITION OF STATE OF LOUISIANA ON BEHALF
OF C. MURRAY HENDERSON, WARDEN

REPORT OF PROCEEDINGS BELOW

Newman v. Henderson, No. 73-3393 on the docket of
the United States Fifth Circuit Court of Appeals,
decided September 27, 1976 (See Appendix for opin-
ion).

JURISDICTIONAL GROUNDS

The Fifth Circuit Court of Appeals handed down its
decision in this Habeas Corpus case on September 27,
1976, and refused Louisiana's Application For Rehear-
ing on December 13, 1976. (See Appendix for denial of
rehearing.)

The statutory provisions relied on to confer jurisdiction on this Court to review the judgment in question by writ of certiorari are 28 U.S.C. 1254 and 28 U.S.C. 2101.

QUESTIONS FOR REVIEW

I.

Whether the Fifth Circuit erred in refusing to consider the voluminous evidence on jury selection methods prevailing in Orleans Parish in 1958-1964 contained in the records in *State v. Barksdale*, 247 La. 198, 170 So.2d 374 (1964), cert. den. *Barksdale v. Louisiana*, 382 U.S. 921 (1965), and its companion cases such as *State v. Gary Simpson*, 247 La. 883, 175 So.2d 255 (1965), cert. den. 384 U.S. 1014 (1966); *State v. Evans & Butler*, 249 La. 861, 192 So.2d 103 (1965), cert. den. 389 U.S. 887 (1967); *State v. Brown*, 249 La. 235, 186 So.2d 576 (1966); *State v. Johnson*, 249 La. 950, 192 So.2d 135 (1966), after holding that the Louisiana trial court's reliance on *Barksdale et al.* amounted to a decision on the merits.

II.

Whether the Fifth Circuit erred in distinguishing the selection process involved in *Washington v. Davis*, — U.S. —, 48 L.Ed.2d 597 (1976), from the grand jury selection process prevailing in Orleans Parish at the time Newman was indicted for aggravated rape in 1962, with the result that, according to the Fifth Circuit, no independent proof of discriminatory purpose

was required of Newman in the present post-conviction proceeding.

STATEMENT OF THE CASE

In 1958 this Court in *Eubanks v. Louisiana*, 356 U.S. 584, held that blacks were unconstitutionally excluded from juries in Orleans Parish. Thereafter Orleans Parish completely changed its jury selection system so as to make it racially nondiscriminatory, with the result that when Bruce Barksdale, Gary Simpson, and other blacks attacked the jury selection methods in Orleans Parish in 1962-1964 no racial discrimination could be found. The records in *State v. Barksdale*, *State v. Simpson*, etc., supra, establish that although blacks constituted approximately 32% of the population in Orleans Parish at that time and only 16-19% of the persons on contemporaneous Orleans Parish juries were black, this discrepancy was fully accounted for by nondiscriminatory factors such as the low economic and educational status of many blacks and the further fact that jurors in Orleans Parish had never, from time out of mind, been paid.¹ Thus, in *Barksdale*, *Simpson*, etc., the State of Louisiana offered a satisfactory explanation as to why the discrepancy between blacks in the population and blacks on Orleans Parish juries existed in 1958-1962. See *State v. Barksdale*, 247 La. 198, 170 So.2d 374 (1964), cert. den. 382 U.S. 921 (1965), and companion cases cited above, particularly *State v. Simpson*, 247 La. 883, 175 So.2d 255 (1965), cert. den. 384 U.S. 1014 (1966).

¹ At the present time jurors in criminal cases in Orleans Parish are paid. This change was made a number of years ago.

In 1962 John Newman, a black man, was indicted by the Orleans Parish Grand Jury for aggravated rape. He did not challenge the selection process used to impanel the grand jury which indicted him, nor did he attack the composition of the petit jury which convicted him in 1964.² However, six or eight years later Newman sought habeas corpus relief in the Louisiana trial court alleging, among other things, racial discrimination in the selection of his grand jury. In denying his petition for habeas corpus the Louisiana trial court held no evidentiary hearing of any kind, but simply cited *Barksdale v. Louisiana*, supra, and other court decisions for the proposition that there was no racial discrimination in the selection of juries in Orleans Parish in 1962 when Newman was indicted.

Thereafter Newman filed a petition for habeas corpus in the United States District Court. Over objection by the State of Louisiana a United States Magistrate refused to consider the State records in *Barksdale*, *Simpson*, etc., and held an evidentiary hearing.³ On the basis of the magistrate's recommendation⁴ the United States District Court granted habeas corpus. On appeal by the State of Louisiana the Fifth Circuit Court of Appeals reversed and remanded with directions that Newman's petition be dismissed under

² Had Newman done so, he would simply have incorporated into his own case the *Barksdale* record, as did others at this time.

³ At this late date none of the Orleans Parish Jury Commissioners serving in 1962 was available to testify, and the sole person who was produced to give testimony concerning jury selection procedures a decade earlier was a minor employee of the Orleans Parish Jury Commission, Julian Murphy.

⁴ For the illegality of such a procedure, see *Barker v. Wingo*, 407 U.S. 514 (1972).

Davis v. United States, 411 U.S. 233 (1973), because Newman had failed to raise the jury issues at the time of his indictment in 1962, as required by Louisiana law. *Newman v. Henderson*, 496 F.2d 896 (5th Cir. 1974).

On petition of Newman this Court granted certiorari in both the present proceeding and the companion case of *Francis v. Henderson*, held that the *Davis* principle applied to the several states, and remanded *Newman v. Henderson* to the Fifth Circuit Court of Appeals for further consideration in light of *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n. 9 (1975), and *Francis v. Henderson*. See *Newman v. Henderson*, ___ U.S. ___, 48 L.Ed.2d 791 (1976); *Francis v. Henderson*, ___ U.S. ___, 48 L.Ed.2d 149 (1976).

On the remand the Fifth Circuit handed down an opinion holding that the Louisiana courts had entertained Newman's jury discrimination claim on its merits by relying on *Barksdale* et al. rather than waiver; that the waiver principle of *Davis* did not therefore bar a federal determination of the merits of Newman's constitutional claim; that, however, *Barksdale* and its companion records, although reliance thereon had amounted to a decision on the merits in the Louisiana courts, were irrelevant to Newman's federal habeas corpus claim and could not be considered by the federal courts because Newman had not been a party thereto; that the hearing before the Magistrate had established that the Orleans Parish Jury Commission had excluded wage earners and the State of Louisiana had not offered a satisfactory explanation of the disparity which had existed between the percentage of blacks living in Orleans Parish and

the percentage of blacks serving on juries there; and that contrary to this Court's holding in *Washington v. Davis*, ___ U.S. ___, 48 L.Ed.2d 497 (1976), Newman did not in his federal habeas corpus suit have to offer independent proof of discriminatory purpose in the selection of his grand jury in Orleans Parish in 1962, as such discrimination would be presumed. See *Newman v. Henderson*, No. 73-3393, decided by the Fifth Circuit on September 27, 1976, which appears in the Appendix hereto.

ARGUMENT

I.

The State of Louisiana respectfully submits that the decision of the Fifth Circuit is unsound and erroneous in holding that the Louisiana courts' denial of Newman's petition for habeas corpus as a matter of law on the authority of *State v. Barksdale* amounted to a decision of Newman's claim on the merits, but that the federal courts, nevertheless, would not consider the *Barksdale et al.* evidence in determining Newman's habeas corpus suit because Newman was not a party to those proceedings.

It is Louisiana's position herein that if the voluminous records covering jury selection procedures in Orleans Parish from 1958 to 1964 in *Barksdale, Simpson, et al.* were not relevant to Newman's claim, then the Louisiana courts did not consider his application on the merits, as no evidentiary hearing of any kind was conducted in the Louisiana trial court which entertained Newman's habeas cor-

pus petition; his petition was simply dismissed as a matter of law in reliance on *State v. Barksdale, etc.* On the other hand, if the Louisiana courts' reliance on *Barksdale, etc.*, was in fact a determination of Newman's jury discrimination claim on the merits, then the federal courts were bound to consider Newman's habeas corpus petition in the light of all of the evidence adduced at the *Barksdale, Simpson, etc.*, hearings in the Louisiana trial courts. Any other result, and particularly the "Catch 22" reasoning used by the Fifth Circuit in its remand opinion herein, is a travesty on justice and a mockery of federal-state comity.

Lefkowitz v. Newsome, 420 U.S. 283 (1975), is easy to distinguish from the instant proceeding. Indeed there is absolutely no similarity between the two cases. In *Lefkowitz* the accused, following a denial of his Motion To Suppress Evidence, pleaded guilty to a drug charge, but nevertheless was permitted by a New York procedural law to appeal the denial of his Motion To Suppress in spite of his guilty plea. On his appeal the Appellate Term of the New York Supreme Court found probable cause to arrest Newsome, upheld the search incident to that arrest, and affirmed Newsome's guilty plea conviction. Newsome then filed a petition for Writ of Habeas Corpus in the United States District Court reiterating his Motion To Suppress. Over objection by New York the United States District Court held that Newsome had not by his guilty plea waived his right to file a federal habeas corpus petition challenging the validity of his search. The Court of Appeals for the Second Circuit affirmed. The Attorney General of New York sought review in this Court, which affirmed on

the ground that when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a later federal habeas corpus proceeding.

It is important to note that in *Lefkowitz* a full evidentiary hearing on the search and seizure issue was held in the New York trial court, and a New York law specifically permitted the search and seizure question to be pursued on appeal following the guilty plea. In the present case, however, *no evidentiary hearing was ever held in the Louisiana trial court on Newman's jury discrimination contention*, either at the time of the grand jury indictment in 1962, when he failed to raise the issue, or later when he filed a petition for habeas corpus in the trial court, when his petition was dismissed as a matter of law on the authority of *Barksdale, etc.*

Consequently, the State of Louisiana respectfully submits that the Fifth Circuit erred in the instant proceeding in holding that "the application of Newman was considered on the merits in the state courts,"⁵

⁵ Because the waiver principle of *Davis v. United States* did not become an issue in the instant case until it was interjected therein on appeal to the Fifth Circuit, the matter was never briefed by opposing counsel and is not referred to in the Fifth Circuit's first opinion herein. See *Newman v. Henderson*, 496 F.2d 896 (5th Cir. 1974). Further, on the remand from this Court following *Newman v. Henderson*, ___ U.S. ___, 48 L.Ed.2d 791 (1976), the Fifth Circuit handed down its opinion herein without asking that counsel brief the waiver question and without further oral argument of any kind. Hence the waiver issue was never explored in any depth by the Fifth Circuit in this case.

or, alternatively, that it erred in refusing to take into account the *Barksdale, etc.*, records in determining Newman's federal habeas corpus claim.

II.

It is also Louisiana's contention that the Fifth Circuit erred in distinguishing the present proceeding from *Washington v. Davis*, ___ U.S. ___, 48 L.Ed.2d 597 (1976); in assuming a purpose on the part of the Orleans Parish Jury Commission to discriminate against blacks in 1962 when it excused from jury service for hardship reasons a large number of wage earners and day laborers; and in not requiring Newman to independently prove a discriminatory purpose as well as a discriminatory impact as a result of such a practice. Louisiana's contention gains particular force from the fact that in the instant case we are dealing with the selection of a *grand jury*, which traditionally is composed of better educated and more financially secure members of the community, who must be men of sound judgment and wide experience. See *State v. Revere*, 232 La. 184, 94 So.2d 25 (1967), for a discussion of the historic role of the grand jury.

In Orleans Parish the twelve members of the Grand Jury, who until fairly recently served as a public service and were not paid (a practice which had always existed), are selected twice a year by a judge of the Criminal District Court for the Parish of Orleans, who chooses the twelve after carefully interviewing the seventy-five persons drawn by lot from the general venire box to form the grand jury venire. See former La. R.S. 15:196, 15:197; Arts. 412-413, La. Code Crim.

Proc. 1967; see also *Eubanks v. Louisiana*, 356 U.S. 584 (1958), for a discussion of how grand juries are selected in Orleans Parish; *State v. Barksdale*, supra, for a discussion of the selection of the 2 grand juries chosen in Orleans Parish in 1962, the year Newman was indicted. Thus, it is unrealistic to assume that daily wage earners of any race, whether black or white, would have been selected to serve on the grand jury which indicted Newman in 1962. That there was no intention to discriminate against blacks in the selection of juries in Orleans Parish from 1958 (date of *Eubanks*) on is evident from the fact that blacks served on every grand jury chosen thereafter, and that two members of the grand jury which indicted Newman for aggravated rape were black.⁶

In *Washington v. Davis*, supra, this Court observed that the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination, and that a purpose to discriminate must be present, and concluded:

"It is also not infrequently true that the discriminatory impact — in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires — may for all practical purposes demonstrate un-

⁶ Although at the time of the *Eubanks* decision only one black had been picked for grand jury duty in Orleans Parish within memory, see *Eubanks v. Louisiana*, supra, at 356 U.S. 586, blacks served on every Orleans Parish grand jury empaneled from 1958 through 1962, the year in which Newman was indicted. See *State v. Barksdale*, 247 La. 198, 223-224, 170 So.2d 374 (1965), cert. denied 382 U.S. 921 (1965).

constitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution" 48 L.Ed.2d at 609. (Emphasis supplied)

Although *Washington v. Davis* involved the validity of a qualifying test administered to police applicants in the District of Columbia, which resulted in a disproportionately high number of black applicants being rejected as police officers, and the instant case concerns the 1962 policy of the Orleans Parish Jury Commissioners in excusing from jury duty on hardship grounds certain day laborers who could not afford to do jury duty, which resulted in a disproportionately lower number of blacks on jury venires than existed in the community at large, the two proceedings are basically similar in that in neither case was there any intent to discriminate, but only a discriminatory impact. Thus, in *Davis v. Washington* the discriminatory impact grew out of sociological and educational factors which rendered it more difficult for blacks to pass the qualifying test, and in the instant case the discriminatory impact resulted from the fact that more blacks than whites in Orleans Parish in 1958-1962 were day laborers with little or no

education or technical training, and because of the further fact that at that time, unlike the present, there were no facilities for paying jurors in criminal cases in Orleans Parish, nor had there been within memory.

In its opinion in the instant case the Fifth Circuit says that the State of Louisiana was unable to offer any explanation as to why only 13% of the men called for jury duty in Orleans Parish in 1962 were black, whereas blacks comprised 31.9% of the adult male population of the parish. This is simply not so. For one thing, the State offered as exhibits in the instant proceeding the Louisiana trial court records in *Barksdale*, *Simpson*, etc., which contain extensive testimony by Daniel E. Knowles, Chairman of the Jury Commission for the Parish of Orleans in 1962, when both Newman and Barksdale were indicted by the Orleans Parish Grand Jury, and a member of the Orleans Parish Jury Commission since 1952, but the Fifth Circuit refused to even look at those records because "Newman was not a party to the other state cases." Instead of weighing the firsthand, contemporaneous, on-the-scene evidence concerning jury selection procedures in Orleans Parish in 1962 which is contained in the voluminous *Barksdale*, *Simpson*, etc., state records — which at worst was highly reliable hearsay — the Fifth Circuit sought an explanation of the disparity at issue in the testimony given before the United States Magistrate approximately ten years after the fact by Julian Murphy, a minor employee of the Orleans Parish Jury Commission in 1962. Mr. Knowles and the other 1962 Orleans Parish Jury Commissioners were either dead or incapable of testifying before the United States

Magistrate in the instant federal habeas corpus proceeding, thus furnishing vivid proof of Mr. Justice Clark's pithy observation in *Michel v. Louisiana*, 350 U.S. 91 (1955), that a long delay in the determination of the validity of a state's inquisitorial process

"... makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness." 350 U.S. 98, n. 5.

In other words, the Fifth Circuit in the present case deliberately by-passed the contemporaneous testimony given by Orleans Parish Jury Commissioners in 1962 which is to be found in *Barksdale*, *Simpson*, etc., and chose instead to base its findings on the highly inadequate evidence which Newman had presented to the United States Magistrate approximately a decade later.

Furthermore, when concluding in its opinion herein that "the State was unable to offer any explanation as to why the disparity exists, . . ." the Fifth Circuit completely ignored that very explanation which it had set out earlier in its opinion as a finding of the United States Magistrate — that is, that the Orleans Parish Jury Commission had at the time regularly excused a large number of daily wage earners. This explanation is reinforced by a study of the reported decisions in

State v. Barksdale, 247 La. 198, 170 So.2d 374 (1965), cert. denied, 382 U.S. 921 (1965); *State v. Simpson*, 247 La. 883, 175 So.2d 255 (1965), cert. denied, 384 U.S. 1014 (1966), and their companion cases cited above, which establish the fact that following the *Eubanks* decision by this Court in 1958 all racially discriminatory practices were abandoned in the selection of juries in criminal cases in Orleans Parish, and that the discrepancy between the percentage of Negro males residing in Orleans Parish at that time and the percentage of those actually doing jury service there resulted purely from various educational, social, and economic factors existing at that period. See, e.g., Louisiana's Opposition To Application For Certiorari filed in this Court in *Barksdale v. Louisiana* and *Simpson v. Louisiana*, supra.

REASONS FOR GRANTING THE WRIT

The State of Louisiana respectfully urges this Court to grant a Writ Of Certiorari herein because:

1. *Lefkowitz v. Newsome*, insofar as it deals with waiver, should not apply to a denial of a petition for habeas corpus by a state trial court as a matter of law, and without an evidentiary hearing of any kind.
2. State court records dealing with jury selection procedures in 1962 should be admissible in evidence at post-conviction suits attacking those procedures, even though the habeas corpus petitioner was not actually a

party to the state cases in which the records are available, particularly if the witnesses themselves are unavailable.

3. A prisoner making a belated post-conviction attack on jury selection procedures involved in his case on the ground that they were racially discriminatory should have the burden of independently proving an intent to discriminate as well as discriminatory result. See *Washington v. Davis*, ___ U.S. ___, 48 L.Ed.2d 597 (1976).

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to issue a Writ Of Certiorari in the instant case and to set aside the judgment of the Fifth Circuit Court of Appeals affirming the judgment of the United States District Court herein granting habeas corpus to John Newman.

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF
LOUISIANA

HARRY F. CONNICK,
DISTRICT ATTORNEY FOR
THE PARISH OF ORLEANS

LOUISE KORNS,
ASSISTANT DISTRICT
ATTORNEY FOR THE
PARISH OF ORLEANS

Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

CERTIFICATE OF SERVICE

I certify that copies of this Petition have been mailed to:

John Wilson Reed, Esq.
2735 Tulane Avenue
New Orleans, Louisiana 70119

Attorney for John Newman

Of Counsel

APPENDIX

John NEWMAN,
Petitioner-Appellee,

versus

C. Murray HENDERSON, Warden,
Louisiana State Penitentiary,
Respondent-Appellant.

No. 73-3393.

United States Court of Appeals,
Fifth Circuit.

Sept. 27, 1976.

Appeal from the United States District Court for the
Eastern District of Louisiana.

Before DYER and MORGAN, Circuit Judges, and
KRAFT*, District Judge.

DYER, Circuit Judge:

In 1964, Newman was convicted of aggravated rape in the Criminal District Court in the Parish of Orleans, Louisiana. He did not appeal. He unsuccessfully applied for a writ of habeas corpus in Louisiana courts, charging racial discrimination in the selection

* Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

of the grand jury which had indicted him. His petition was rejected on the ground that the grand jury system prevailing at the time of his indictment had not been discriminatory. His application to the Supreme Court of Louisiana was denied. Newman then sought federal habeas relief. The district court granted Newman's petition, concluding that the state had failed to rebut the prisoner's *prima facie* showing of grand jury discrimination. We vacated the district court's grant of habeas relief, *Newman v. Henderson*, 5 Cir. 1974, 496 F.2d 896, and directed that the petition be dismissed because of the district court's failure to consider the waiver-by-failure-to-object principle of *Davis v. United States*, 1973, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216. The United States Supreme Court granted certiorari, vacated the judgment and remanded the cause to this Court for further consideration in light of *Lefkowitz v. Newsome*, 1976, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196, and *Francis v. Henderson*, 1976, 425 U.S. ___, 96 S.Ct. 1708, 48 L.Ed.2d 149. We proceed to do so.

The application of Newman was considered on the merits in the state courts. Because "the state courts entertained the federal claims on the merits, a federal habeas court must also determine the merits of the applicant's claim." *Lefkowitz v. Newsome*, 1975, 420 U.S. 283, 292, 95 S.Ct. 886, 891, 43 L.Ed.2d 196 n. 9; *Francis v. Henderson*, 1976, 425 U.S. ___, at ___, 96 S.Ct. 1708 at 1711, 48 L.Ed.2d 149 n. 5. Therefore, it is now clear that the waiver principle of *Davis* does not stand as a bar to a federal determination of the merits of Newman's constitutional claim.

On the merits, the state does not attack the findings of the district court that there was a systematic exclusion of qualified citizens from the grand jury that indicted Newman. It simply argues that under the provisions of 28 U.S.C.A. § 2254(d) the district court should not have held an evidentiary hearing on Newman's challenge to grand jury selection methods, but was barred by decisions of the Louisiana Supreme Court in cases brought by other parties during the same period in which it was held that the system of grand jury selection for the Orleans Parish grand jury was not discriminatory.¹ The state, in essence, argues that the district court was bound to resolve Newman's challenge by the findings of fact in the prior cases. The flaw in Louisiana's argument is that Newman was not a party to the other state cases. Therefore, § 2254(d)'s provision is inapposite.

The Orleans Parish Jury Commission followed a systematic policy of exclusion of wage earners, a practice already condemned by this Court in *Labat v. Bennett*, 5 Cir. 1966, 365 F.2d 698. Furthermore, in January of 1962 (the year of Newman's state indictment) blacks comprised 31.9% of the male population between the ages of 21 and 64 with at least five years of education, but only 13% of persons called for jury duty in that month were black.

It has long been the rule in this Circuit and elsewhere that a *prima facie* case of discrimination is established by showing a disparity between the

¹ Louisiana relies on *State v. Barksdale*, 1964, 247 La. 198, 170 So.2d 374, cert. den. 1965, 382 U.S. 921, 86 S.Ct. 297, 15 L.Ed.2d 236; *State v. Evans*, 1966, 249 La. 861, 192 So.2d 103, cert. den. 1967, 389 U.S. 887, 88 S.Ct. 110, 19 L.Ed.2d 187.

percentage which the racial group constitutes of the persons from whom a jury list is drawn, and the percentage which that racial group constitutes of the jury list which is thereafter compiled. Once a *prima facie* case has been established, the burden shifts to the state to offer a satisfactory explanation why the disparity exists. *Partida v. Castaneda*, 5 Cir. 1975, 524 F.2d 481, cert. granted 1976, ____ U.S. ____, 96 S.Ct. 2645, 49 L.Ed.2d 385 (1976); *Muniz v. Beto*, 5 Cir. 1970, 434 F.2d 697. In our view, this approach remains sound, and is not affected by the recent decision of the Supreme Court in *Washington v. Davis*, 1976, ____ U.S. ____, 96 S.Ct. 2040, 48 L.Ed.2d 597.

In *Washington*, applicants for positions on the Washington, D. C. police force claimed that a written examination used to screen applicants was discriminatory, and thus invalid under the Fifth Amendment. The district court found that the number of black police officers was not proportionate to the population mix of the city, that a higher percentage of blacks failed the test than whites, and that the test had not been validated to establish its reliability. The Supreme Court rejected the view of the Court of Appeals for the District of Columbia that these facts, without proof of discriminatory intent, were sufficient to establish a constitutional violation. Rather, the Supreme Court held that proof of discriminatory purpose, as well as proof of discriminatory impact, was necessary to establish such a violation.

However, the Supreme Court recognized that discrimination in the grand jury context might require a different rule:

It is also not infrequently true that the discriminatory impact — in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires — may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.²

____ U.S. at ____, 96 S.Ct. at 2049. In our view, the distinctions between the selection process attacked in *Washington* and the grand jury selection process here considered demand that independent proof of discriminatory purpose required in the former not be mandated for the latter.³

As the Supreme Court recognized, proof of discriminatory impact in *Washington* had little probative force with regard to the question of discriminatory intent. Although discriminatory impact is logically consistent with a discriminatory intent on the part of those administering the selection process, it is equally consistent with a conclusion that the whites taking the examination were better qualified as a group than

² The Supreme Court, directly following this statement, said: Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

____ U.S. at ____, 96 S.Ct. at 2049. As will be shown, we do not believe this statement alters the result in this case.

³ This is not to say that there is no proof of discriminatory purpose in the case before us. That purpose is inferred from the discriminatory impact and the failure of the state to offer a sufficient nonracial explanation for that impact.

the blacks taking the same examination. Independent proof of discriminatory intent is required so that a probative choice can be made between these two alternatives. ____ U.S. ____, ____, 96 S.Ct. 2040, 2050, 48 L.Ed.2d 597.

In the grand jury context, the disparity which must be proved in order to establish a *prima facie* case of discrimination is not a disparity between the percentage of the population which the racial group constitutes and the percentage which that group occupies on the grand jury list, but rather a disparity between the latter and the percentage of those *qualified to sit* on the grand jury which the racial group constitutes. In this situation, any disparity cannot be attributed to the fact that one group is better qualified than another, as in *Washington*, because this factor has been taken into account in defining the disparity. The disparity can reasonably be inferred to result solely from the selection process. Cf. *James v. Wallace*, 5 Cir. 1976, 533 F.2d 963. Where in *Washington* an inference of discriminatory purpose could not be made from the fact of discriminatory impact, here an inference of discriminatory purpose is a reasonable one. And, since the State was unable to offer any explanation as to why the disparity exists, the inference of discriminatory purpose is the *only* reasonable one.

Without a satisfactory explanation as to the cause of the disparity, we do not have before us a policy "neutral on its face and serving ends otherwise within the power of government to pursue". See fn. 2, *supra*. Therefore, we do not find *Washington* controlling, and we reaffirm the approach to grand jury discrimina-

tion cases exemplified in *Partida*, *supra*, and *Muniz*, *supra*, and utilized by the district court below.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 73-3393

D. C. Docket No. CA-71-1164 "A"

JOHN NEWMAN,
Petitioner-Appellee,

versus

C. MURRAY HENDERSON, Warden
Louisiana State Penitentiary,
Respondent-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before DYER and MORGAN, Circuit Judges, and
KRAFT*, District Judge.

* Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

8a

JUDGMENT ON REMAND FROM THE
UNITED STATES SUPREME COURT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that this cause be and the same is hereby affirmed in accordance with the action of the Supreme Court and the opinion of this Court.

September 27, 1976

Issued as Mandate:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

December 13, 1976

TO ALL COUNSEL OF RECORD

NO. 73-3393 — John Newman v. C. Murray Henderson,
Warden, Louisiana State Penitentiary

9a

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
Clerk

/s/ SUSAN M. GRAVOIS
Deputy Clerk

10a

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

December 22, 1976

Mr. William L. Brockman
Assistant District Attorney
104 Supreme Court Bldg.
301 Loyola Avenue
New Orleans, LA 70112

No. 73-3393 — John Newman v. C. Murray
Henderson, Etc.

MANDATE STAYED TO AND INCLUDING
January 21, 1977

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

11a

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
EDWARD W. WADSWORTH
Clerk

/s/ MARY BETH BREAU
Deputy Clerk

enc.

cc: Mrs. Barbara Rutledge
Mr. Harry F. Connick
Mrs. Louise Korn
Mr. John W. Reed